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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] 63

A. P. DICKSON, JOE DICKSON, I. N. CALVERT, C. T. DICKINSON AND ERNEST MILLER, PETITIONERS,

VS.

UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

## BRIEF FOR RESPONDENT OPPOSING CERTIORARI.

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

**No. 930.**

A. P. DICKSON, JOE DICKSON, I. N. CALVERT, C. T. DICKINSON AND ERNEST MILLER, PETITIONERS,

VS.

UHLMANN GRAIN COMPANY, A CORPORATION, RESPONDENT.

## BRIEF FOR RESPONDENT OPPOSING CERTIORARI.

### SUMMARY OF THE FACTS.

The decision sought to be reviewed is reported as *Uhlmann Grain Company* v. *Dickson et al.*, 56 Fed. (2d) 525. We refer to respondent as plaintiff and to petitioners as defendants.

The Eighth Circuit Court of Appeals held that plaintiff, a grain broker, was entitled to recover its commissions and advancements from defendants, its customers, on transactions wherein defendants, through plaintiff as their agent, purchased and sold grain for future delivery, where it appeared that the orders were given for execution and actually executed on the Grain Exchanges of Chicago, Minneapolis and Winnipeg; that each contract obligated the parties to deliver or accept the grain; that each transaction was consummated by an offsetting purchase or sale on the trading floor of the same Exchange; and that plaintiff acted only as agent for defendants. It was further held that none of such transactions was a Missouri contract, but all contracts were governed by the laws of the places where they were executed, and that the fact that defendants did not intend to make or accept an actual delivery of the grain was not sufficient to warrant a finding that the transactions were mere fictions or gambling under the common law. It was also ruled that, since all of the transactions consummated in the United States were upon "contract markets," designated as such by the Secretary of Agriculture under the Grain Futures Act, and in full compliance with the act and the regulations of the Federal Department, pursuant thereto, they were valid transactions by virtue of that act. The legal questions involved herein are the correctness of these rulings.

Petitioners' statement of the facts omits all reference to many of the findings of the Circuit Court

of Appeals, and is so meager and inaccurate in other respects concerning other pivotal, undisputed facts, that we deem an additional statement necessary.

**The Factual Evidence.**

The evidence discloses that, at all the times in question, plaintiff was engaged in the grain, grain elevator and grain brokerage business, and was a member in good standing of the Grain Exchanges or Boards of Trade of Kansas City, Missouri; Chicago, Illinois; Minneapolis, Minnesota; and Winnipeg, Canada. Plaintiff was also a clearing member of the Chicago and Kansas City Grain Clearing Houses or Associations (R. 30, 74, 141). The business of plaintiff consisted in buying and selling cash grain for itself and for its customers, the operation of grain elevators, and acting as agent or broker for its customers in the purchase and sale of grain for future delivery. In the year 1924, when all of the transactions in question were had, plaintiff maintained a principal office at Chicago, Illinois, and a branch office at Kansas City, Missouri. Plaintiff also maintained a branch office in Carrollton, Missouri, in charge of one E. S. McDonough.

The method of handling each of such transactions was as follows: Plaintiff maintained a private leased telegraph wire from its Carrollton office to its Kansas City office. Verbal orders of purchase or sale were given by defendants to plaintiff's agent at Carrollton, and were by him transmitted by telegram to plaintiff's

Kansas City office for acceptance or rejection by plaintiff. The orders in each and every instance were for plaintiff, as broker or agent, to purchase or sell grain for future delivery for the accounts of the respective defendants, on the Chicago, Minneapolis or Winnipeg Board of Trade or Grain Exchange. Plaintiff's agent at Carrollton, Missouri, had no authority to accept or reject any order for the purchase or sale of grain for future delivery, the acceptance or rejection of such order in each and every instance being made by plaintiff at its Kansas City office. If the order was accepted by plaintiff, plaintiff's Kansas City office immediately telegraphed the order for execution to plaintiff's Chicago office. If the order was for the purchase or sale of Chicago wheat, it was executed on the trading floor of the Chicago Board of Trade. If for the purchase or sale of Minneapolis or Winnipeg wheat, it was executed on the trading floor of that respective Board of Trade or Grain Exchange. Immediately upon the execution of an order, the Chicago office of plaintiff notified plaintiff's Kansas City office thereof by telegram, and the Kansas City office immediately made out and mailed to the (defendant) customer by United States mail, a written confirmation of the order and of its execution. Such written confirmation in each and every instance recited the date of the contract, the quantity and kind of grain bought or sold, the contract price (per bushel) of the commodity, the delivery month, and the Board of Trade or Exchange upon which the contract was executed. Such written confirmation was mailed to the

defendant customer on the same day that each order was given, accepted and executed. It recited: "We have this day bought (or sold) for your account, at Chicago, Ill., (Minneapolis or Winnipeg)." The particular commodity bought or sold was described in the written confirmation, together with the quantity, contract price (per bushel), and month of delivery thereof. Each of said written confirmations contained the following paragraph:

> "All transactions made by us for your account contemplate the actual receipt and delivery of the property and payment therefor. We reserve the right to close these transactions when deposits are running out, without giving further notice. We also reserve the privilege of clearing all transactions through Clearing Associations, if there be any, from day to day in accordance with the usage, rules or regulations of the Exchange where the trade is made, prevailing at the time. All purchases and sales made by us for you are made in accordance with and subject to the rules, regulations and customs of the Chamber of Commerce or Board of Trade where the trades are made, and the rules, regulations and requirements of its Board of Directors, and all amendments that may be made thereto. This contract is made under authority of the Act of Congress known as 'The Future Trading Act'." (R. 30-33, 74, 75, 116, 137, 143.)

Each contract was made and executed on the respective Board of Trade or Exchange in the name of plaintiff, as a clearing member of such Board of Trade or Exchange; and, likewise, was executed with a grain broker, who was also a clearing member of such Board of Trade or Exchange, in the name of said broker, act-

ing either for himself or for an undisclosed principal (R. 74, 75, 99). The reason for such procedure is that the rules of the respective Exchanges, and also Section 4 (b) of the Grain Futures Act, prescribe and require that all contracts for the purchase and sale of grain for future delivery shall be made by or through a clearing member of the Exchange which has been designated as a "contract market" (R. 75, 79, 81). The official report of the Grain Futures Administration of the Federal Government for the year 1924, contains the following language:

> "Under the rules of the exchanges the parties to every such contract must be members of the clearing association (or clearing house). Nonclearing members of the exchange may enter into such contract, but they are 'obliged to furnish forthwith the name of a clearing member who will accept and be liable for such contract.' Persons who are not members of the exchange must, of course, transmit their orders to some member for execution, and resulting transactions on the floor of the exchange must stand in the name of a clearing member. Speaking strictly, therefore, clearing members are the parties to these transactions on the exchange and they look for settlements to one another. Each clearing member then looks when necessary to his own customers, who are the persons for whom the transactions are made" (R. 110, 111).

Each transaction was evidenced immediately by a record in writing showing the date, the parties and their addresses, the property covered and its price, and the terms of delivery, in compliance with Section 4 (b) of the Federal Grain Futures Act (R. 98, 146, 147). Each clearing member kept a record of the name of the cus-

tomer for whose account the contract or transaction was made. Under the rules of the respective Exchanges, and the regulations of the Federal Department of Agriculture, the name of the customer for whose account the transaction was made could always be had on request (R. 139, 140, 146, 147). Each transaction was executed under the supervision of the Federal Grain Futures Administration, and reported to the Supervisor of the Grain Futures Administration, in accordance with the rules and regulations in force and adopted by the Secretary of Agriculture (R. 97). The Supervisor testified that plaintiff made daily written reports of all its 1924 transactions and dealings on the several Exchanges, in accordance with the regulations and requirements of the Department of Agriculture, and in accordance with the provisions and requirements of the Grain Futures Act, and that plaintiff was in good standing with the Federal Department. During the year 1924, the Federal Department did not require a member of an Exchange to make a report of the name of the customer for whom such member was acting, unless the particular transaction exceeded one-half million bushels of grain. No single transaction involved herein exceeded one-half million bushels. The Chicago Board of Trade, the Minneapolis Chamber of Commerce, and the Kansas City Board of Trade were officially designated as "contract markets" by the Secretary of Agriculture, in accordance with the provisions of the Grain Futures Act (R. 106-111).

Each clearing member of the respective Exchanges was responsible, either to the Exchange, or to the

Clearing Association of such Exchange, for all transactions of purchase or sale consummated for and on behalf of his customers. Each clearing member of the Exchange continuously maintained a large margin or deposit, aggregating several hundred thousand dollars, with the Clearing Association of such Exchange, to secure the performance of contracts made by such clearing member for and on behalf of his customers (R. 99, 146). At the close of each day's business, the clearing members reported their respective transactions to the Exchange, or to the Clearing Association, and on the following day, according to the rules of the Exchange and Clearing Association, the reported transactions of each member were cleared by offset, and each member credited or charged with whatever balance there might be in his favor or against him, in much the same manner as transactions between banks are cleared through the Bank Clearing Houses or Associations. The performance of each of the transactions involved herein was protected and secured by the margin or deposit maintained by plaintiff with the Clearing House of the Exchange on which such transaction was made and consummated (R. 99, 100).

Each contract of purchase or sale executed by plaintiff for and on behalf of the defendants obligated the plaintiff to the full performance of such contract. The rules of the Exchange required plaintiff either to receive or to deliver the grain contracted for, or to respond in money damages for failure to do so. Each of such contracts contemplated the actual delivery of the

grain contracted to be purchased or sold; but the customs, usages and rules of the respective Exchanges allowed and permitted the setting off of purchases by sales, or of sales by purchases, and most of such contracts or transactions for the purchase or sale of grain for future delivery were performed and carried out by such an offset (R. 80, 81, 82, 105). On most of the orders executed by plaintiff for and on behalf of defendants, the defendants put up a margin or deposit with plaintiff, just as plaintiff, in turn, maintained a margin or deposit with the Clearing Association of the Exchange on which the orders of defendants were executed (R. 68, 138, 145, 146).

The evidence is undisputed and uncontradicted that each and every transaction initiated by an order of each of the defendant customers of plaintiff was actually consummated by the execution, on one of the Exchanges or Boards of Trade of Chicago, Minneapolis, or Winnipeg, of an actual contract for the purchase or sale of grain for future delivery (R. 57, 59, 105, 137, 140, 141, 143, 146). Only one of the many transactions was executed on the Kansas City Board of Trade, or in the State of Missouri, and it resulted in a profit to defendant Calvert, and hence no recovery is sought by plaintiff upon that transaction (R. 58). None of the transactions in question was a sham or fictitious transaction, in which the plaintiff took the other or opposite side of the transaction with the defendant customer. In each and every transaction in question, plaintiff was personally and pecuniarily obligated and bound for the full per-

formance of the contract for the purchase or sale of grain for future delivery so made for and on behalf of the defendant customer (R. 65, 66, 68, 99, 138, 139, 143, 144, 145, 148). In no transaction in question did plaintiff profit by defendant's loss, or did plaintiff lose if defendant profited (R. 57, 120, 144). On the contrary, the undisputed evidence is that plaintiff never acted in any other capacity than that of agent or broker for the defendant customers, and its sole and only remuneration was the commission charged and earned by plaintiff for such services rendered for and on behalf of the defendant customers (R. 100, 120, 144).

The evidence is likewise undisputed that every purchase order and contract, and every sale order and contract, was fulfilled and performed by an offsetting sale or purchase before the time for the required taking or making delivery of the grain bought or sold, and that each such offsetting sale or purchase was actually executed, on the order of the defendant customer for whom it was made, on the trading floor of the Exchange or Board of Trade, in exactly the same manner as the original purchase or sale, between two clearing members, one of whom was plaintiff acting for the defendant customers, in accordance with the customs, rules and regulations of the Exchange, and in conformity with the terms and provisions of the Federal Grain Futures Act. There is no evidence whatsoever that the clearing member of the Exchange, or his principal, with whom plaintiff contracted for and on behalf of its defendant customer, had any intention, secret or otherwise, not to take or to make delivery

of the grain contracted for, or that plaintiff had any knowledge whatsoever respecting the intention of the opposite party to such contract.

While one of the defendants testified on direct examination (and it was agreed, on the trial of the consolidated causes, that the testimony of the one defendant was typical of that which would have been given by all of the defendants) that he did not intend to make or take delivery of any of the grain contracted for, and so told McDonough, nevertheless, on cross examination, he testified unequivocally that he was intending, in lieu of an actual delivery, to close out his initial purchases or sales with offsetting sales or purchases before the date of delivery, as provided for in the contracts. And the undisputed evidence is that every transaction of all of the defendants was handled in this manner. This defendant also testified to his full knowledge, understanding and intent that plaintiff, as agent and broker, was to execute all orders given by defendants for the purchase or sale of grain for future delivery upon the Grain Exchanges in Chicago, Minneapolis or Winnipeg (R. 156, 157; 161-166; see, also, opinion of Judge Gardner, R. 207-208; opinion of Judge VanValkenburgh, R. 212).

## SUMMARY OF THE ARGUMENT.

Respondent proposes to show that (1) each contract, having been executed in Chicago, Minneapolis or Winnipeg, its validity is not determinable by the law or statutes of Missouri, but is determinable by the rules and principles of the common law; (2) the contracts were presumably lawful and the burden was upon defendants to prove that they were wagering or fictitious transactions; (3) there was no substantial evidence that any of the transactions were mere fictions or wagers; (4) each transaction consummated in the United States, having been executed between plaintiff and another clearing member of a Grain Exchange designated by the Secretary of Agriculture as a "contract market," and in full compliance with the Federal Grain Futures Act, was valid under the provisions of that statute, which superseded all State legislation covering the same field.

## ARGUMENT.

### I.

The undisputed evidence shows that every contract was actually executed upon the Chicago, Minneapolis or Winnipeg Grain Exchange. None of the contracts was a Missouri contract. No transaction herein was executed in Missouri. It is the well established rule of law that the legality of all such transactions is exclusively determinable by the law of the place where the contracts are consummated and executed, and not by the law of the place where the original orders initiating the transactions are given. *Berry* v. *Chase*, 146 Fed. 625, 629; *Wilhite* v. *Houston*, 200 Fed. 390, 392; *Lyons Milling Co.* v. *Goffe & Carkener*, 46 Fed. (2d) 241, 245; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109, 114; *Hoyt* v. *Wickham*, 25 Fed. (2d) 777, 779; *Edwards Brokerage Co.* v. *Stevenson*, 160 Mo. 516, 528; 27 Corpus Juris, p. 1050. No law of the States of Illinois or Minnesota, or of the Dominion of Canada, was pleaded or shown in evidence in the instant case. In the absence of proof of the law of the place where the contracts were consummated and executed, the validity of the transactions must be determined in accordance with the rules and principles of the common law. *Edwards Brokerage Co.* v. *Stevenson*, 160 Mo. 516, 528. Applying the rules of the common law to the transactions herein, there was no sufficient or substantial evidence to invalidate any of the transactions.

Each contract and transaction having been executed without the State of Missouri, in Chicago, Minneapolis or Winnipeg, its validity was not determinable by any statute or law of Missouri. The so-called "bucket shop" statute of Missouri has no application to the transactions herein; nor have the Missouri decisions, applying the "bucket shop" statute of that state, any relevancy herein. It follows that the decision and the judgment of the Court of Appeals do not involve a question of local (Missouri) law, and no decision of the Missouri courts was necessary to be applied by the Court of Appeals.

II.

The contracts and transactions herein are fair on their face, untainted with any wrongful or illegal intent, and are presumptively lawful. The defendants affirmatively alleged that the contracts were gambling or wagering transactions. The burden of proving that a transaction is a wager rests upon the party alleging it. *Clews* v. *Jamieson*, 182 U. S. 461, 490, 491; *Bibb* v. *Allen*, 149 U. S. 481, 492; *Rountree* v. *Smith*, 108 U. S. 269; *Cleage* v. *Laidley*, 149 Fed. 346, 352; *Browne* v. *Thorn*, 272 Fed. 950, 952; *Gettys* v. *Newburger*, 272 Fed. 209, 216; *Mullinix* v. *Hubbard*, 6 Fed. (2d) 109; *Wilhite* v. *Houston*, 200 Fed. 390; *Lyons Milling Co.* v. *Goffe & Carkener*, 46 Fed. (2d) 241, 246.

III.

Defendants failed to sustain the burden of proving their allegations that the transactions were wagers. As

correctly found by the Court of Appeals, there was no substantial evidence that the transactions were mere fictions or wagers at common law.

The fact that each contract of purchase or sale of grain for future delivery, executed by plaintiff as defendants' agent and broker, was discharged and performed by an offsetting contract of sale or purchase of grain, before the times of delivery fixed by the original contracts arrived, does not render such contracts and transactions illegal or unenforceable. It is conclusively settled, by the controlling decisions of this Court and of the Courts of Appeals, that an offsetting contract of sale or purchase of grain is the legal equivalent, and has all the effect, of actual delivery, and is entirely consistent with a serious and lawful business purpose and with an intent that the contracts shall be performable in accordance with their expressed terms. The intention, on the part of a purchaser or seller of grain for future delivery, that the contract shall be closed out before delivery is due, by set-off or ringing off in accordance with the rules and regulations of the Exchange and its clearing house, is not sufficient or substantial evidence that the transaction is wrongful or illegal, or does such intention make the contract a wager and invalid. *Board of Trade of Chicago* v. *Christie Grain & Stock Co.*, 198 U. S. 236, 248, 250; *Clews* v. *Jamieson*, 182 U. S. 461, 489; *Cleage* v. *Laidley*, 149 Fed. 346, 350; *Gettys* v. *Newburger*, 272 Fed. 209, 218-220; *Wilhite* v. *Houston*, 200 Fed. 390, 392; *Browne* v. *Thorn*, 272 Fed. 950, affirmed 260 U. S. 137; *Mullinix* v. *Hubbard*, 6 Fed. (2d)

109; *Hoyt* v. *Wickham,* 25 Fed. (2d) 777, 779; *Lyons Milling Co.* v. *Goffe & Carkener,* 46 Fed. (2d) 241; *Solomon* v. *Newberger,* 35 Fed. (2d) 328, 330. Nor does the fact that defendants, in most instances, put up margins to protect plaintiff from loss in executing the orders of defendants tend to show that the contracts were wagers or gambling transactions. *Gettys* v. *Newburger,* 272 Fed. 209, 220.

A contract, fair upon its face and presumably lawful, cannot be declared void or unenforceable as a wagering contract upon proof that one only of the parties thereto intended it to be such; it must be shown that both the opposite parties to the contract intended and understood the transaction to be a wagering or gambling transaction. *Clews* v. *Jamieson,* 182 U. S. 461, 489; *Bibb* v. *Allen,* 149 U. S. 481, 492; *Rountree* v. *Smith,* 108 U. S. 269; *Berry* v. *Chase,* 146 Fed. 625, 630; *Wilhite* v. *Houston,* 200 Fed. 390, 392; *Cleage* v. *Laidley,* 149 Fed. 346, 352; *Gettys* v. *Newburger,* 272 Fed. 209, 219; *Lyons Milling Co.* v. *Goffe & Carkener,* 46 Fed. (2d) 241, 246; *Edwards Brokerage Co.* v. *Stevenson,* 160 Mo. 516, 528, 61 S. W. 617; *State of Kansas ex rel.* v. *Rosenbaum Grain Co.,* 115 Kan. 40, 50, 226 Pac. 80.

As rightly found by the Court of Appeals, there was no evidence that the other and opposite parties to the contracts, namely, the dealers or brokers upon the Exchanges at Chicago, Minneapolis or Winnipeg, where each contract was consummated and executed, had any intention but that the contracts were to be fulfilled and performed according to their expressed terms, by

the actual physical delivery of grain and payment therefor, before the times fixed by the contracts for delivery. The record herein is wholly devoid of any evidence tending to show that the dealers or brokers upon said foreign Exchanges had any intention that the contracts were not to be performed according to their expressed terms, or that they intended such transactions to be mere wagers upon the fluctuations of the grain market.

There is not a scintilla of evidence in the record, and no allowable or justifiable inference of fact can be drawn from the evidence, that any transaction herein was sham, pretended, or fictitious. On the contrary, the undisputed evidence, as found by the Court of Appeals, is that every transaction was real and actual. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a finding or decision to be made on remote or conjectural inferences. Direct and positive evidence, which is undisputed and uncontradicted, may not be overthrown by remote and conjectural inferences of doubtful character. *United States* v. *Ross*, 92 U. S. (2 Otto) 281; *Manning* v. *Mutual Life Insurance Co.*, 100 U. S. (10 Otto) 693. Inferences of fact can be legitimately drawn only from premises which are certain, direct and immediate, and which are not remote, conjectural and grounded upon mere possibilities. *Illinois Surety Co.* v. *Standard Underground Cable Co.*, 238 Fed. 546, 548; *United States Fidelity & Guaranty Co.* v. *Des Moines National Bank*, 145 Fed. 273, 279; *Cunard Steam Ship Co.*

v. *Kelley*, 126 Fed. 610, 617; *George* v. *Capital Traction Co.*, 295 Fed. 965, 968.

The Eighth Circuit Court of Appeals rightly found, upon the record herein, that every transaction was real and actual, and that there was no substantial evidence, or reasonable and legitimate inference, that any transaction was pretended or fictitious, or that any contract herein was intended to be a wager or gambling transaction.

The decision of the Court of Appeals upon the issue of the validity of the transactions at common law is tenable and in full accord and harmony with the controlling decisions of this Court, and of other Circuit Courts of Appeals, and with the weight of judicial authority upon the question of general law so decided.

The decision of the Court of Appeals upon that issue alone is a sufficient and complete determination of the instant case, independently and regardless of any consideration of the Grain Futures Act, or of its application and effect on the transactions herein.

IV.

Each transaction (except those at Winnipeg), having been executed between plaintiff and another clearing member of a Grain Exchange designated by the Secretary of Agriculture as a "contract market," and in full compliance with the Grain Futures Act of Congress, was valid and enforceable under the provisions of that Federal statute, which superseded and displaced all existing state legislation covering the same field and subject matter.

The Grain Futures Act (42 Stat. 998-1003; 7 U. S. C. A., Secs. 1-17), approved September 21, 1922, was enacted by Congress for the expressed purpose of preventing and removing obstructions and burdens upon interstate commerce in grain, by regulating transactions in grain future exchanges. In Section 2 of the act, Congress defined a transaction in respect to any article of grain to be in interstate commerce "if such article is part of that current of commerce usual in the grain trade whereby grain and grain products * * * are sent from one state with the expectation that they will end their transit, after purchase, in another," and that "articles normally in such current of commerce shall not be considered out of such commerce through resort being had to any means or device intended to remove articles in respect thereto from the provisions" of the act. In Section 3 of the act, Congress made the specific recitals and findings of fact that "transactions in grain involving the sale thereof for future delivery as commonly conducted on Boards of Trade and known as 'futures' are affected with a national public interest; that such transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling grain and the products and by-products thereof in interstate commerce; that the prices involved in such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of grain * * * and to facilitate the movements thereof in interstate commerce; that

such transactions are utilized by shippers, dealers, millers and others engaged in handling grain * * * in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price; that the transactions and prices of grain on such Boards of Trade are susceptible to speculation, manipulation and control, and sudden or unreasonable fluctuations in the prices thereof * * *, and that such fluctuations in prices are an obstruction to and a burden upon interstate commerce in grain * * * and render regulation imperative for the protection of such commerce and the national public interest therein."

The constitutionality of the Grain Futures Act, and the exclusive power and authority of Congress to deal with the subject matter thereof, was conclusively decided by this Court in *Board of Trade of Chicago* v. *Olsen,* 262 U. S. 1. Analogous transactions, comprising the purchase and sale of cattle and other livestock, likewise have been conclusively held by this Court to directly affect commerce among the states and as threatening to obstruct or burden the freedom of interstate commerce, and, therefore, to be properly the subjects of regulation and control by Congress under and by virtue of the exclusive powers and authority conferred by the commerce clause of the Constitution of the United States. *Swift & Co.* v. *United States,* 196 U. S. 375, 398; *Stafford* v. *Wallace,* 258 U. S. 495. The plain import of those decisions is that Congress, by enacting the Grain Futures Act, has entered and appropriated the legislative field

with respect to the regulation and control of transactions in grain futures executed upon contract markets.

The so-called "bucket shop" statute of Missouri is wholly referable to, and rests upon, the police power of the state. It obviously deals with and regulates the same and identical subject matter dealt with by Congress in the Grain Futures Act, namely, transactions in grain futures. It is conclusively settled by the uniform decisions of this Court that all laws and statutes resting upon the police power of the state must yield whenever Congress, in the exercise of the exclusive powers granted to it by the Federal Constitution, legislates on the same subject matter. The power and authority of Congress to regulate interstate commerce, and all the instrumentalities and transactions affecting such commerce, is supreme and exclusive. Whenever Congress rightfully exercises such power by the enactment of a law regulating transactions in or affecting interstate commerce, the right of a state to apply its police power for the purpose of regulating similar transactions affecting interstate commerce ceases, and thereafter such state laws have no application or effect upon those matters with respect to which Congress has undertaken to legislate and regulate. *Gulf, C. & S. F. R. R. Co.* v. *Hefley,* 158 U. S. 98; *Northern Pacific Ry. Co.* v. *State of Washington,* 222 U. S. 370; *Missouri Pacific Ry. Co.* v. *Porter,* 273 U. S. 341.

Congress, by the enactment of the Grain Futures Act, having entered the legislative field with respect to transactions in grain futures, that Congressional act has superseded and displaced all state laws which

theretofore attempted to regulate or deal with the same subject matter. *Stafford* v. *Wallace,* 258 U. S. 495; *Swift & Co.* v. *United States,* 196 U. S. 375; *Board of Trade of Chicago* v. *Olsen,* 262 U. S. 1; *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission,* 13 Fed. (2d) 673, 685; *Lyons Milling Co.* v. *Goffe & Carkener,* 46 Fed. (2d) 241; *State ex rel. Burnett* v. *Rosenbaum Grain Co.,* 115 Kan. 40, 222 Pac. 80; *Goffe & Carkener* v. *Henneberger,* 132 Kan. 211, 294 Pac. 672.

Congress, by Section 4 of the Grain Futures Act, has manifested its purpose to regulate and control all dealings and transactions in grain futures by making it unlawful for any person to make or execute any contract of sale or purchase of grain for future delivery, except under two specified alternatives: (a) where the seller at the time of the making of the contract is the owner or grower, or the renter of land on which the same is to be grown, of the actual physical property (the grain) covered thereby; and, (b) "where such contract is made by or through a member of a board of trade which has been designated by the Secretary of Agriculture as a 'contract market,' * * * and if such contract is evidenced by a record in writing which shows the date, the parties to such contract and their addresses, the property covered and its price, and the terms of delivery." Having made it unlawful to engage in transactions in grain futures except under the one or the other of the expressed alternatives, it seems obvious that it was the manifest intention and purpose of Congress to legitimatize those transactions, dealings

and contracts in grain futures as fall fairly within either of the excepted alternatives. The act does not in terms prescribe, as the criterion by which the validity of any transaction in grain futures is to be determined and measured, that the purchaser shall intend to take, or that the seller shall intend to make, actual physical delivery of the grain. Had Congress intended to fix such a test, it would doubtless have so provided in express and positive terms in the Grain Futures Act. Congress was satisfied to leave the validity of transactions in grain futures to be measured and determined by the compliance of the parties with the one or the other of the excepted alternatives prescribed in the act, and not to rest the validity of such transactions upon the mere intention of the parties, the proof of which intention is, to say the least, always unsatisfactory, uncertain and doubtful. The Federal and the Missouri legislation, both of which deal with the subject of transactions in grain futures, prescribe widely different standards, criteria and tests by which the validity of such transactions are to be measured and determined. Because of such conflicting legislation, that of the State must give way to that of the National Congress, acting in pursuance of the exclusive powers conferred by the commerce clause of the Federal Constitution. As truly and pointedly said by the Supreme Court of Kansas in *State ex rel.* v. *Rosenbaum Grain Co., supra,* "the grain company does not have two masters over its handling of grain futures."

The petitioners cite the decision of the District Court for the Northern District of Georgia in *Fenner*

v. *Boykin,* 3 Fed. (2d) 674, affirmed 271 U. S. 240, as being in conflict with the decision of the Court of Appeals herein. That case was commenced for the purpose of enjoining the defendants, public officers of Georgia, from arresting and prosecuting the plaintiffs under a Georgia statute forbidding dealings and transactions in futures on margins within that state. The case involved transactions in cotton futures only, and the District Court remarked, in its reported opinion, that "transactions in future cotton are here particularly in question, and the discussion will be limited to them." The case did not involve any legislation of Congress dealing with transactions in cotton futures. Neither prior to, nor since, the decision in *Fenner* v. *Boykin* has Congress undertaken to regulate dealings and transactions in cotton futures, as Congress manifestly has done with respect to transactions in grain futures by the enactment of the Grain Futures Act, which act has nothing to do with transactions in cotton futures. Congress not having entered and appropriated the legislative field in respect to transactions in cotton futures, it necessarily follows that the Georgia statute, in so far as it dealt with and undertook to regulate transactions in cotton futures, had never been displaced and superseded by Congressional legislation. As was correctly held in *Fenner* v. *Boykin,* the Georgia statute exclusively occupied the field of legislation as respects transactions in cotton futures, and was enforceable by the state officers in that respect without interference of the Federal Courts. Such is the full extent and import of the decisions of

the District Court, and of this Court, in *Fenner* v. *Boykin,* and that case has no bearing or relation on the question of the application, scope and effect of the Grain Futures Act.

Other cases cited by petitioners as being in conflict with the decision of the Court of Appeals herein are *State of Missouri* v. *Christopher,* 318 Mo. 225, 2 S. W. (2d) 621, and *C. A. King & Co.* v. *Horton,* 116 Ohio St. 205, 156 N. E. 124. The Christopher case involved a Missouri statute which prohibited the keeping of a "*place*" where is permitted "the buying and selling of grain and other products without any intention of receiving and paying for the property so bought or delivering the property so sold." The Missouri Supreme Court found that the *place* in Sedalia, Missouri, maintained by the defendant Christopher, was not a "contract market," and that no transaction was executed at any other place or upon any other market than Sedalia, and, therefore, the Grain Futures Act had no application. However, the Missouri Supreme Court correctly conceded that "the effect of the Grain Futures Act was to restrict the operation of State laws, so as to make them inapplicable to transactions coming within the terms of the Grain Futures Act, conducted on a 'contract market' according to the rules prescribed by that market." (318 Mo., l. c. 247, 2 S. W. (2d), l. c. 630.)

In *King & Co.* v. *Horton,* the Ohio Supreme Court found, upon the factual evidence in that case, that the transactions wholly failed to comply with the re-

quirements of Section 4 of the Grain Futures Act, and that the record conclusively manifested that both the opposite parties to the transactions intended them to be mere wagers or bets upon the rise or fall of the grain market. The factual evidence upon which the Ohio Supreme Court ruled the case of *King & Co.* v. *Horton* is wholly at variance with that in the instant case, wherein the Circuit Court of Appeals has expressly found that there is no evidence that the transactions were intended by the parties to be wagers or bets, and that every transaction was in full compliance with the requirements of the Grain Futures Act. In so far as the decision of the Ohio Supreme Court may be conceived to hold that there is no real or apparent conflict between Federal and State legislation undertaking to regulate transactions in grain futures, and that such Federal and State legislation operate concurrently, such decision of the Ohio Supreme Court is clearly out of harmony with, and contravenes, the controlling Federal decisions, both of this Court and of the Courts of Appeals.

It is, therefore, plainly manifest that the Circuit Court of Appeals has decided no principle or question of Federal law which has not heretofore been conclusively settled by this Court; nor has it decided a Federal question in any way in conflict with applicable and controlling decisions of this Court.

For all of the foregoing reasons, it is respectfully submitted that the decision and the judgment of the Eighth Circuit Court of Appeals are correct, and in ac-

cordance with the principles of law announced in controlling and applicable decisions of this Court and of other Circuit Courts of Appeals, and in harmony with the weight of judicial authority, and, therefore, the writ of certiorari prayed for herein should not issue.

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